RECORD AND BRIEFS

No. 15-833

DEC 21 2015

In the Supreme Court of the United States

JEFFREY BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, *Petitioner*,

v.

ANTONIO A. HINOJOSA, *Respondent*.

ON PETITION A FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2010, California amended state law to prevent prisoners who commit certain misconduct from earning further good-time credits. The state courts have rejected ex post facto challenges to the new law, and the Ninth Circuit has previously held those rulings are not contrary to clearly established federal law under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). But here, the court refused to apply AEDPA's presumption that the silent denial of respondent's state habeas claim was a ruling on the merits. The court "looked through" that denial to a venue-based ruling by a state trial court—although the state supreme court was not reviewing the trial court's decision, and there was no venue issue in the higher court. Unconstrained by AEDPA, the Ninth Circuit held, in conflict with the California Supreme Court and two other federal circuits, that changing a law to prevent a state prisoner from earning future good-time credits based on new or continuing in-prison misconduct violates the Ex Post Facto Clause. The questions presented are:

1. Whether AEDPA's presumption that a state decision rejecting a claim is a ruling on the merits can be rebutted by looking through to an earlier state ruling which applied a procedural bar that, under state law, could not be the basis for the later decision.

2. If so, whether a change in state law reducing a prisoner's ability to earn future good-time credits based on new or continuing prison misconduct violates the Ex Post Facto Clause as applied to a prisoner who committed his underlying crime before the change in law.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of Jeffrey Beard, Secretary, California Department of Corrections and Rehabilitation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-24a) is reported at 803 F.3d 412. The opinion of the district court (App. 29a-39a) is unpublished, as are the orders of the state supreme court (App. 40a) and court of appeal (App. 41a) and the opinion of the state superior court (App. 42a-45a).

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2015. App. 1a. The court's opinion directed that the mandate issue forthwith and indicated that no petition for rehearing would be entertained. App. 24a. On November 17, 2015, the court denied the State's motion to recall the mandate and accordingly refused to consider the State's petition for rehearing en banc. App. 25a-26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Respondent Hinojosa was released on parole after the court of appeals ordered immediate implementation of its decision. While on parole he is in the constructive custody of Secretary Beard, who is therefore substituted as the named petitioner in this case in accordance with this Court's Rule 35.3.

STATUTORY PROVISION INVOLVED

1. Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

2. Section 2933.6 of the California Penal Code provides in pertinent part as follows, with the italicized language in subsection (a) having been added by Cal. Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 44, effective January 25, 2010:

> (a) Notwithstanding any other law, a person who is placed in a Security Housing Unit or an Administrative Segregation Unit for misconduct described in subdivision (b) *or upon validation as a prison gang member or associate* is ineligible to earn work credits or good behavior credits during the time he or she is in the Security Housing Unit or the Administrative Segregation Unit for that misconduct.

(b) This section applies to the following offenses:

(1) Murder, attempted murder, and solicitation of murder. For purposes of this paragraph, solicitation of murder shall be proven by the testimony of two witnesses, or of one witness and corroborating circumstances.

(2) Manslaughter.

(3) Assault or battery causing serious bodily injury.

(4) Assault or battery on a peace officer or other nonprisoner which results in physical injury.

(5) Assault with a deadly weapon or caustic substance.

(6) Rape, attempted rape, sodomy. attempted sodomy, oral copulation, or attempted oral copulation accomplished against the victim's will.

(7) Taking a hostage.

(8) Escape or attempted escape with force or violence.

(9) Escape from any departmental prison or institution other than a camp or reentry facility.

(10) Possession or manufacture of a deadly weapon or explosive device.

(11) Arson involving damage to a structure.

(12) Possession of flammable, explosive material with intent to burn any structure or property

(13) Solicitation of assault with a deadly weapon or assault by means of force likely to produce great bodily injury, arson, or a forcible sex act.

(14) Intentional destruction of state property in excess of four hundred dollars ($400) during a riot or disturbance.

(c) This section does not apply if the administrative finding of the misconduct is overturned or if the person is criminally prosecuted for the misconduct and is found not guilty.

STATEMENT

1. In 2003, Respondent Hinojosa pleaded guilty to armed robbery and street terrorism. App. 3a. He was sentenced to sixteen years in prison. *Id.* When he committed his crimes state inmates were generally eligible to earn custody credits against their sentences for good behavior. The law, however, prohibited an inmate from earning future custody credits if he engaged in misconduct that required him to be segregated from the general population. *See* Cal. Penal Code §2933.6 (West 2002) (reprinted above as later amended). At that time, section 2933.6 applied to inmates segregated based on misconduct such as murder, attempted murder, manslaughter, rape, hostage-taking, or assault. It did not include segregation based on conduct demonstrating or confirming affiliation with a prison gang. *Id.*

In 2009, prison officials "validated" Hinojosa as an associate of the Mexican Mafia prison gang. App. 3a.[2] Once validated, the state considered Hinojosa a

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[2] The Mexican Mafia is a California prison gang, which was formed in 1957 and by 1977 controlled most of the criminal activity inside California's prisons. While the Mexican Mafia exerts control over virtually all Hispanic street gangs in Southern California, it is separate from the street gangs and requires its members to take a blood oath in order to join. *See People v. Valdez*, 55 Cal. 4th 82, 94 (2012); *People v. Sisneros*, (continued...)

threat to the safety and security of the institution, requiring his placement in a Security Housing Unit, or SHU. Cal. Regs. tit. 15, § 3341.5(c)(2)(A)(2) (2002); App. 3a-4a.

In October 2009, a broad criminal justice reform measure was signed into law that increased property crime thresholds, reformed credit-earning schemes, and gave discretion to corrections officials and counties to determine appropriate conditions of parole and probation. Cal. Senate Bill No. 18, 3rd Ex. Sess. 2009-2010. Among the dozens of reforms made in that bill was an amendment to California Penal Code section 2933.6 to provide that segregation based on validated gang affiliation would also prevent an inmate from earning future sentence-reducing credits. Before the 2010 amendment, Hinojosa's expected release date was September 27, 2015. App. 6a. After the amendment, that date was extended one year to September 27, 2016. *Id.*

Hinojosa filed a state habeas petition challenging the application to him of the 2010 change in section 2933.6. App. 42a. The state superior court construed the petition to raise two claims: that applying the amendment to him violated his plea agreement and his due process rights, and that it violated the Ex Post Facto Clauses of the state and federal constitutions. *Id.* at 43a. The court denied the first claim on the merits but dismissed the ex post facto claim for improper venue, holding that Hinojosa should have brought that claim in the county where he was confined, not where he was convicted. *Id.*; *id.* at 44a. Under standard California procedure, Hinojosa pursued the matter not by

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174 Cal. App. 4th 142, 147-149 (2009) (describing requirements by prison for validation in the gang).

appealing from the superior court's judgment but by filing a new habeas petition, raising the same claims, in the California Court of Appeal. *Id.* at 41a; *see generally, e.g.*, *Walker v. Martin*, 562 U.S. 307, 312 (2011) (describing California habeas procedure). That court denied the new petition without comment. App. 41a. Hinojosa then filed another original habeas petition (not a petition for discretionary review of the court of appeal's decision) in the California Supreme Court. *Id.* at 40a. That court, too, denied the petition without comment. *Id.*

2. Hinojosa then filed a federal habeas petition in the district court. App. 30a. Applying AEDPA's strict standards, the district court denied relief. *Id.* at 30a, 33a, 36a. Hinojosa appealed, and the court of appeals granted a certificate of appealability limited to "whether the 2010 amendment to California Penal Code § 2933.6, which deprives a prisoner of a future opportunity to earn an earlier release, violates the Ex Post Facto Clause." App. 27a. After further review, that court reversed. *Id.* at 1a-24a.

The court of appeals began by acknowledging that the same claim had previously come before it in the context of federal habeas review, under AEDPA, of California decisions rejecting ex post facto challenges to application of the 2010 amendment. App. 9a-10a. In *Nevarez v. Barnes*, 749 F.3d 1124 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 295 (2014), the court had "considered this same question on similar facts" and concluded that the state courts' rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law as established by this Court. *See id.*

In this case, however, the court held that it was not constrained by the deferential AEDPA standard of review. App. 9a-11a. The court acknowledged that under *Harrington v. Richter*, 562 U.S. 86, 98-100

(2011), and *Johnson v. Williams*, 133 S. Ct. 1088 (2013), an unexplained denial of relief by a state court is presumed to be a decision "on the merits" for purposes of 28 U.S.C. 2254(d), and thus entitled to full AEDPA deference. *Id.* at 10a. Here, however, the court faulted the State, which relied on those decisions, for "fail[ing] to comprehend the relationship between *Richter* ... and *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), which directs us to consider the last reasoned decision of the state courts, *see id.* at 806." App. 10a (parallel citations omitted). Under *Ylst*, the court observed, "[w]here the last reasoned state-court decision rejects a federal claim solely on procedural grounds, any presumption that a subsequent summary denial decided the claim on the merits is rebutted." *Id.* at 10a-11a. Because the state superior court, which was the only state court to issue an opinion, denied Hinojosa's ex post facto claim on the procedural ground of improper venue, the court of appeals concluded that it was "not bound by AEDPA" in its federal habeas review. *Id.*[3]

Reviewing Hinojosa's claim de novo, the court held that it violated the Ex Post Facto Clause to apply the 2010 amendment to section 2933.6 "to prisoners, like Hinojosa, who committed their underlying criminal conduct before the amendment's enactment." App. 24a. The court relied on its own

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[3] The court also acknowledged that, even if the state judgment was based on a procedural default, normally a federal habeas court would not be able to reach the merits of a claim so long as the procedural rule in question was "firmly established and regularly followed" as a matter of state law. App. 11a. In that regard, however, the court faulted the State for not arguing a state procedural default, and thus deemed the issue waived. *Id.* (The State, of course, had no occasion to argue procedural default if the state supreme court ruled on the merits.)

precedent involving changes to the consequences of parole violations, which in turn had adopted as controlling authority this Court's summary affirmance in *Greenfield v. Scafati*, 277 F. Supp. 644, 644-45 (D. Mass. 1967), *aff'd*, 390 U.S. 713 (1968) (per curiam)—although again the court had previously held, in the AEDPA context, that *Greenfield* did not "clearly establish" a federal rule applicable to the different situation in which a state changes the rules applicable to ongoing prison misconduct. *Id.* at 13a-15a & n.6; *see Nevarez*, 749 F.3d at 1128-1129.

Reviewing the matter de novo, the court concluded that the same rule applies where a change in the ability to earn good-time credits based on prison misconduct alters a prisoner's eligibility for earlier release. App. 17a-18a. In that regard, the court of appeals accepted the conclusion of the California courts that the gang-related misconduct at issue in this case is a continuing offense, and thus that the amendment to section 2933.6 could properly be applied to stop any future earning of credits after its effective date "if the relevant date [for ex post facto analysis] is the date of the in-prison misconduct." *Id.* at n.8. It concluded, however, that application of the amendment to a current prisoner, even based on new or ongoing prison misconduct, should be analyzed as changing the legal consequences of the underlying criminal conduct. *Id.* at 17a-18a. The court thus remanded the matter with instructions to issue the writ and direct the State to release Hinojosa on the date he would have been released if he had continued to earn release credits under the prior version of section 2933.6. *Id.* at 24a.

The court directed that its mandate issue "forthwith," and indicated that "[n]o petition for

rehearing w[ould] be entertained." App. 24a. After releasing Hinojosa onto parole, the State asked the court to recall its mandate so that it could consider a petition for en banc rehearing that the State lodged along with its request—making clear that it would not seek to return Hinojosa to physical custody unless and until the panel's decision was superseded by one favorable to the State. *See id.* at 25a. The court denied that motion, and thus refused to consider the State's en banc petition. *Id.*[4]

REASONS FOR GRANTING CERTIORARI

When a state court has adjudicated a federal claim on the merits, a federal habeas court may set aside the state judgment only if it is contrary to

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[4] After Hinojosa was released on state parole, he was detained by federal immigration authorities. The State is informed that he has since been deported to Mexico. He nonetheless remains on state parole for three years subject to parole conditions the State imposed on him, including a condition that he not reenter the United States illegally. *See, e.g.*, Cal. Penal Code § 3053(a) (West 2015) (State may impose parole conditions); *see also People v. Laupas*, 188 Cal. App. 4th 436 (2010) (upholding condition that probationer not reenter the United State illegally). Hinojosa could be subject to parole revocation should he violate his parole conditions, Cal. Penal Code § 3000.08, and to reincarceration in California to serve the remainder of his prison term if the court of appeals' judgment is reversed. The case is therefore not moot. *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (government petition to reinstate vacated conviction not mooted by defendant's deportation); *see also, e.g., United States v. Valdez-Gonzalez*, 957 F.2d 643 (9th Cir. 1992) (government appeal seeking longer sentence not moot where defendant served sentence imposed by district court and was deported); *United States v. Suleiman*, 208 F.3d 32, 36-38 (2d Cir. 2000) (same); *United States v. Alvarez-Pineda*, 258 F.3d 1230, 1235 (10th Cir. 2001) (same).

federal law clearly established by this Court. Where, as here (App. 40), the state court rejects a claim without comment but in an actual ruling (not merely a denial of discretionary review), this Court has recognized a strong presumption that the state court acted on the merits. *See, e.g., Harrington v. Richter*, 562 U.S. 86, 98-100 (2011). While in some circumstances a federal habeas court may instead "look through" the silent denial of a claim by a higher state court and presume that it rested on the same ground as the last reasoned decision of a lower court rejecting the claim, that type of analysis should not be allowed to supersede the presumption of action on the merits if the purported "look through" makes no legal or logical sense in the context of a particular case.

Here, the California Supreme Court rejected, without comment, a federal claim raised in a state habeas petition filed in the supreme court itself—not in an appeal from the judgment of a lower court. App. 41a. The Ninth Circuit refused to treat that silent denial as a merits ruling, entitled to deferential review under AEDPA, on the theory that, under *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), it should instead presume that the state high court's ruling rested on the same procedural ground that a state superior court had given for dismissing an earlier petition brought in *that* court—improper venue. App. 10a. In the circumstances of this case, however, reliance on *Ylst* makes no sense at all. The procedural bar invoked by the superior court (improper venue) could not, as a matter of state law or common sense, have applied to Hinojosa's original petition in the state supreme court, which by definition has statewide jurisdiction. And more generally, the state high court, adverting specifically to this Court's decision in *Richter* concerning the

presumption of merits adjudication, has expressly confirmed that when it denies a state prisoner's federal claim without explanation, it has considered and rejected that claim on the merits. Under these circumstances, the court of appeals' invocation of *Ylst* to displace *Richter*, and its consequent refusal to accord AEDPA deference to the California courts' established position on the federal question at issue, were plainly wrong.

That threshold failure to comply with AEDPA led the court to use this federal habeas case to address Hinojosa's ex post facto claim de novo, and in the process create a conflict not only with the California courts (including a longstanding, reasoned decision of the state supreme court) but also with decisions of the Second and Fourth Circuits. All those courts have previously held that changes to statutes or rules that reduce a prisoner's ability to earn future good-time credits as a consequence of in-prison misconduct do not violate the Ex Post Facto Clause. The contrary decision of the Ninth Circuit in this case puts state prison officials in the untenable position of being forced to choose whether to continue enforcing a state statute that has been expressly upheld by the state courts or, instead, stop enforcing state law because of a contrary view on the part of the regional federal court of appeals. Accepting the federal decision would also interfere substantially with the State's ability to administer its prisons and to deter serious and ongoing in-prison misconduct.

This Court should grant certiorari in the first instance to correct the court of appeals' improper failure to continue deferring to the state courts' consistent rejection of the federal claim raised in this case. Reversing the decision below on that basis would eliminate the legal conflict the court of appeals has created and restore the legal clarity needed by

state prison officials. Alternatively, if the Court concludes that the court of appeals properly addressed the ex post Facto question here de novo, then it should provide the necessary clarity itself by resolving the conflict created by the Ninth Circuit's decision in this case.

1. State courts are not required to explain their reasoning when they reject a federal claim. *Richter*, 562 U.S. at 98-100. When a state court denies a federal claim without explanation, federal courts must generally presume that the state court adjudicated the claim on the merits. *Id.* As a merits adjudication, the state decision may be set aside on federal habeas review only if it is contrary to or an unreasonable application of federal law as clearly established by this Court's decisions. *Id.*; 28 U.S.C. § 2254(d). And as the decision below expressly acknowledges, under that strict standard federal habeas courts would defer—as the Ninth Circuit previously has—to the determination of the California courts that application of amended section 2933.6 to a state prisoner like Hinojosa does not violate the Ex Post Facto Clause. App. 9a; *Nevarez v. Barnes*, 749 F.3d 1124, 1128 (9th Cir. 2014).

Application of the *Richter* presumption of on-the-merits adjudication makes particular sense in cases, such as this one, where the California Supreme Court has rejected a federal claim in an actual ruling (that is, not simply by denying discretionary review) but without explanation. The state court has expressly confirmed, after and in light of *Richter*, that "[u]nless otherwise stated in the order, such summary denials indicate this court has considered and rejected the merits of each claim raised." *In re Reno*, 55 Cal. 4th 428, 447 (2012). In making that statement, the court specifically cited *Richter*'s statement that "it may be presumed that

the state court adjudicated the claim on the merits in the absence of any indication of state-law procedural principles to the contrary." It also cited the contemporaneous decision in *Walker v. Martin*, 562 U.S. 307 (2011), another case arising out of California in which this Court observed that, under California's state habeas procedures, an "order denying a [habeas] petition without explanation or citation ordinarily ranks as a disposition on the merits." *Id.* (citing *Richter*, 562 U.S. at 99, and *Martin*, 562 U.S. at 310). Accordingly, when the California Supreme Court denied Hinojosa's state habeas petition without opinion, its decision reflected consideration and rejection of his federal claim on the merits—and the state high court had every reason to expect that it would be so understood by any later federal habeas court, and accorded appropriate deference under AEDPA.

"[T]he *Richter* presumption is a strong one that may be rebutted only in unusual circumstances " *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013). It "may be overcome when there is reason to think some other explanation for the state court's decision is more likely," *Richter*, 562 U.S. at 99-100; and one possible such reason is the ability of the federal court, under appropriate circumstances, to "look through" the silent decision of one state court to the prior, reasoned decision of a lower court and to presume that the higher court's otherwise unexplained decision rests on the same, previously articulated grounds. *See id.* (citing *Ylst v. Nunnemaker*, 501 U.S. at 803). Even before AEDPA and *Richter*, however, this Court had cautioned that a federal habeas court contemplating such a "look through" must have due regard for the "details of state law," which might establish that there would be no sound basis for applying the look-through

presumption in a particular case. *Ylst*, 501 U.S. at 803.

Here, the court of appeals held that the *Richter* merits presumption was rebutted by the *Ylst* look-through presumption. App. 10a. It "looked through" the state supreme court's silent denial of a habeas petition presented to that court and inferred that it rested on the same ground as the superior court's procedural denial of the petition previously presented to *that* court. *Id.* In this case, however, it requires no complex inquiry into state law to understand that "the [*Ylst*] presumption, as applied, is wrong." *Ylst*, 501 U.S. at 803. First, the state supreme court has expressly said, in this specific context, that its silent denials are to be understood as rulings on the merits. *In re Reno*, 55 Cal. 4th at 447. (Where the court instead relies on a procedural ground for rejection, it typically includes a citation to indicate as much. *See, e.g., In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (discussing certain procedural bars imposed by the court's orders and explaining that when an order does not expressly impose a procedural bar raised by a respondent, the court has rejected that particular bar).) And second, as a matter of straightforward California procedural and substantive law, the faulty-venue ground invoked by the superior court *could not* have provided the basis for the later supreme court decision.

Procedurally, a California inmate has no right to appeal a denial of a habeas corpus petition by a superior court. Cal. Penal Code §§ 1506, 1506; *In re Clark*, 5 Cal. 4th 750, 767 n.7 (1993). To seek further consideration, he files a new petition in the California Court of Appeal. *Clark*, 5 Cal. 4th at 767 n.7. If that petition is denied, the inmate may file either (i) a petition for discretionary review of the denial or (ii) another new petition, this time directly

in the California Supreme Court. *See also Martin*, 562 U.S. at 312-313; *Carey v. Saffold*, 536 U.S. 214, 221 (2002) (discussing California's "original writ system"). Hinojosa followed the second course, filing a new petition in the supreme court. App. 40a. When adjudicating claims brought in a new habeas corpus petition, the California Supreme Court exercises original jurisdiction—not appellate jurisdiction. *Clark*, 5 Cal. 4th at 767 n.7. And that original jurisdiction extends, by definition, to the entire State. Thus, the faulty-venue ground for dismissal invoked by the superior court could not possibly have provided the basis for the California Supreme Court's summary order denying Hinojosa's habeas petition to that court.

It was, accordingly, the court of appeals—not the State—that "fail[ed] to comprehend the relationship between *Richter* ... and *Ylst*" in this case. *See* App. 10a. There was no basis in this case for the court to rely on a look-through under *Ylst* for holding that the *Richter* presumption of state-court merits adjudication had been rebutted and that the federal court was "not bound by AEDPA." *Id.* at 11a. On the contrary, the court was required to apply *Richter* (and take the California Supreme Court at its word in *Reno*), recognize the state court's rejection of Hinojosa's ex post facto claim as a decision on the merits, and defer to that decision, for federal habeas purposes, unless Hinojosa could meet AEDPA's strict standard for setting it aside—which, as the court acknowledged (*id.* at 9a), he could not. Because it improperly failed to apply AEDPA, the court embarked on a de novo consideration of the ex post facto claim that led it, as described below, to create a decisional conflict, put state prison administrators in an untenable position, and adopt a constitutional position that would unduly hamper the

administration of state prison systems throughout the Ninth Circuit. This Court should grant certiorari on the first question presented in order to clarify the relationship between *Richter* and *Ylst* and to enforce AEDPA's bar on the relitigation, in federal habeas proceedings, of claims that have already been permissibly rejected by the state courts on the merits.

2. On the merits, the Constitution provides that "[n]o State shall ... pass any ... ex post facto Law ...." U.S. Const. art. I, § 10, cl. 1. "Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). "To fall within the ex post facto prohibition, a law must be retrospective—that is, 'it must apply to events occurring before its enactment'—and it 'must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (citations omitted); *see also, e.g.*, *Weaver*, 450 U.S. at 29.

As to retrospective application, the "critical question is whether the law changes the legal consequences of acts completed before its effective date." *Weaver*, 450 U.S. at 31. As the court of appeals recognized, however, the question in this case is whether the relevant "acts" for purposes of this analysis are the crimes that led to Hinojosa's incarceration or the gang-related misconduct he committed in prison that led to his commitment to segregated housing and, after the 2010 amendment to section 2933.6, to the loss of his ability to earn good-time credits so long as that misconduct continued. App. 12a-13a. Relying on its own prior cases, *Weaver*, and this Court's summary affirmance

of the three-judge decision in *Greenfield v. Scafati*, 277 F Supp. 644, 644-45 (D. Mass. 1967), *aff'd mem.*, 390 U.S. 713 (1968), the court of appeals held that it was Hinojosa's 2002 criminal conduct that provided the basis for the ex post facto analysis, even though it was ongoing in-prison misconduct that triggered application of the 2010 amendment. App. 13a-15a. The court reasoned that altering "a prisoner's ability to earn [good-time] credits affects the length of his prison term and therefore affects the measure of punishment attached to the original crime." *Id.* at 13a.

The court of appeals' holding misapplies *Weaver* and *Lynce v. Mathis*, 519 U.S. 433 (1997). *Weaver* was this Court's first non-summary decision addressing a change to a state's statutory scheme affecting prisoner good-conduct credits. There, Florida provided its prisoners with good-time credits of five, ten, or fifteen days per month, depending on the number of years the prisoner had served on his sentence. *Weaver*, 450 U.S. at 26. The State then amended its good-conduct statute, reducing the credits to three, six, and nine days per month. *Id.* Under these circumstances, this Court explained that the question whether the change was retrospective "c[ould]be recast as asking whether [the amended statute] applie[d] to prisoners convicted for acts committed before the provision's effective date." *Id.* at 31. The Court concluded that the amendment was retrospective because it replaced the general credit-earning scheme that was in effect at the time Weaver committed his crimes. *Id.* The amendment also disadvantaged Weaver, because it reduced his "opportunity to shorten his time in prison *simply through good conduct*." *Id.* at 33-34 (emphasis added). The Court reasoned that "a prisoner's eligibility for reduced imprisonment is a significant

factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Id.* at 33.

In *Lynce* the Court considered a Florida statute repealing certain early-release credits that had previously been awarded to prisoners because of prison overcrowding. *See* 519 U.S. at 435. After taking account of Lynce's credits, prison officials released him from prison in 1992. *Id.* Shortly after his release, the State determined that a new 1992 statute had retroactively repealed certain credits. *Id.* at 436. Lynce was rearrested and returned to physical custody. *Id.*

This Court held that the credit cancellation and reincarceration were clearly retrospective. *Id.* at 441. The State argued that repeal of the credits did not violate the Ex Post Facto Clause because the credits were awarded to alleviate overcrowding, not for good conduct as in *Weaver*. *Id.* at 442. This Court held, however, that the Legislature's subjective purpose was irrelevant. *Id.* Citing *Weaver*, the Court reiterated that altering a credit scheme can constitute an increase in punishment because eligibility for reduced imprisonment in the ordinary course of serving a sentence is a "significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Id.* at 445-446 (citation omitted).

In *Weaver* and *Lynce*, Florida sought to reduce or eliminate credits that were made available to all state prisoners as part of the State's general scheme of sentencing and incarceration. The changes were retrospective because they, too, applied automatically to affected prisoners, without regard to any post-conviction misconduct. *Weaver*, 450 U.S. at 31; *Lynce*, 519 U.S. at 441. And they disadvantaged the affected prisoners by, in effect, extending the amount

of time they would be in prison if they simply served their time in the ordinary course, without any new misconduct.

California's statute is different. Unlike the prisoners in *Weaver* and *Lynce*, Hinojosa was affected by the 2010 amendment to section 2933.6 only because he continued to commit in-prison misconduct after its effective date. *See* App. 16a n.8. Absent that misconduct, Hinojosa would have continued to have the opportunity to earn the same amount of credits after the 2010 amendment as he did before. The amendment is triggered only by new or continued misconduct occurring *after* its effective date.

3. The court of appeals held that for purposes of the Ex Post Facto Clause a prospective change in a current prisoner's ability to earn good-time credits based on in-prison misconduct was the same as a change in the credit rules applicable to a prisoner who is returned to custody after violating a condition of probation, parole, or other supervised release. App. 13a-15a. That holding conflicts with longstanding and previously uniform decisions of the California courts and the Second and Fourth Circuits.

a. Thirty years ago, the California Supreme Court rejected an Ex Post Facto Clause challenge to statutory changes affecting the regulation of inmate behavior in state prisons and, in particular, how certain misconduct would affect a prisoner's ability to earn or retain good-time credits. *In re Ramirez*, 39 Cal. 3d 931 (1985), *cert. denied*, 476 U.S. 1152 (1986). The state Legislature amended the Penal Code to expand the acts of misconduct subject to credit forfeiture and to increase the number of days a prisoner might forfeit. *Id.* The state supreme court held that applying the new rules uniformly to all

current inmates, including a prisoner who had committed his crimes before the amendment, did not violate the federal or state Ex Post Facto Clauses. *Id.* at 936. Applying this Court's decision in *Weaver v. Graham*, the state court held that the amendments changed only the definition and consequences of in-prison misconduct and thus operated only prospectively, rather than increasing the punishment for a prisoner's original crime. *Id.* at 936-937 The court reasoned that "[i]f any aspect of prison life is unconnected to a prisoner's original crime, it would seem to be the sanctions for his misconduct while in prison." *Id.* at 936.

Ramirez specifically distinguished the statute this Court considered in *Weaver*· "There is a critical difference between a diminution of the ordinary rewards for satisfactory performance of a prison sentence—the issue in *Weaver*—and an increase in sanctions for *future misbehavior* in prison—which is at issue here." 39 Cal. 3d at 937. The court also reasoned that, even considered in relation to a prisoner's initial offense, amendments to the rules for in-prison behavior neither increased the petitioner's maximum sentence nor reduced the credit he could earn against that sentence by complying with prison rules. *Id.* The court recognized *Weaver*'s teaching that a general statutory structure for earning good-time credits could be a significant factor in plea bargains and sentencing, but in the context of changes to the particular rules governing prison behavior it rejected "the notion that the sanctions for possible future prison misconduct constitute a 'significant factor' for either the trial judge or defendant." *Id.*

Finally, *Ramirez* specifically considered this Court's summary affirmance in *Greenfield*, which had addressed a Massachusetts law that changed

how a prisoner who *complied* with prison rules could earn good-time credits after being *returned* to prison for violating the terms of an earlier parole. 39 Cal. 3d at 937-938. The California Supreme Court concluded that *Greenfield* did not control the case before it, dealing with adjustments to the rules for in-prison misconduct, for two reasons: that decision had focused "on conduct outside the prison walls," rather than on "the effect on prison administration of a holding that the statute was invalid," and "invalidating the [*Greenfield*] statute as to certain prisoners did not have the effect of immunizing their future conduct from sanctions for prison rule violations." *Id.* at 938. In contrast, the court explained, it would be "something entirely different to have a prison population subject to different disciplinary rules and penalties for violations in prison," depending on when they had committed their underlying crimes. *Id.* at 937. "From the standpoint of prison order," it would be "simply infeasible to run a prison in which some inmates [were] wholly or partially immune from punishment for conduct for which others receive[d] serious penalties," such as loss of sentence credits. *Id.*[5]

Although *Ramirez* was decided in 1985 and addressed a different statute, its application to the present case, and thus the conflict between it and the

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[5] Because *Ramirez* specifically considered and distinguished *Greenfield* and the context of changes in consequences for violations of post-release restrictions, there is no reason to think that the California Supreme Court would change its position if it reconsidered the issue here in light of either the court of appeals' reasoning in the present case or any post-*Ramirez* authority addressing the post-release context, such as this Court's discussion of *Greenfield* and federal supervised release in *Johnson v. United States*, 529 U.S. 694, 700-701 (2000).

Ninth Circuit's decision in the present case, is clear. Moreover, two recent precedential California appellate court decisions address the specific statutory amendment at issue here and confirm the position of the state courts that uniform application of the amendment to all current prisoners does not violate the federal Ex Post Facto Clause. *In re Efstathiou*, 200 Cal. App. 4th 725, 729-730 (2011); *In re Sampson*, 197 Cal. App. 4th 1234, 1241-1242 (2011).[6] And in the state habeas proceedings that preceded the federal proceedings in *Nevarez*, the state superior court relied on *Sampson*, and the California Supreme Court summarily denied an original habeas petition presented to that court—a decision that, again, reflects consideration and rejection of the claim on the merits. *See Nevarez*, 749 F.3d at 1127-28 (reciting history and sustaining state rejection of claim on AEDPA review); *In re Reno*, 55 Cal. 4th at 447 [7] There is, accordingly, no question that the position of the state courts, including the California Supreme Court, is that section 2933.6 may be validly applied to any current prisoner who

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[6] Trial courts throughout the State are bound to follow these appellate decisions. *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County*, 57 Cal. 2d 450, 455 (1962).

[7] The California Supreme Court's docket records confirm that *Nevarez* involved summary denial of an original petition, not a denial of discretionary review of a decision by the state court of appeal. *See* http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1994545&doc_no=S197257. In *Efstathiou* and *Sampson*, the state supreme court denied discretionary review. http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1999997&doc_no=S198672; http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1988023&doc_no=S195508.

engages in the ongoing in-prison misconduct at issue here, regardless of the date of his original offense.

b. The Ninth Circuit's decision in this case also conflicts with decisions of the Second and Fourth Circuits addressing similar ex post facto claims.

In *Abed v. Armstrong*, 209 F.3d 63 (2d Cir. 2000), the Second Circuit addressed a change to the ability to earn good-conduct credits much like the 2010 California amendment at issue here. Three months after Abed was sentenced, the Connecticut Department of Corrections issued a directive eliminating good-time credits for inmates who were classified as "prison gang members and who, as a result, posed 'a threat to the safety of staff, the facility, inmates or the community or the order of the department.'" *Id.* at 65 (citation omitted). Abed was classified as a gang member, and was deprived of the ability to earn good-time credits for some forty months while that classification remained in effect. *Id.* He argued that application of the new directive to him violated the Ex Post Facto Clause. *Id.* The Second Circuit rejected that claim, on de novo review.[8] The court noted that, unlike the statutes at issue in *Weaver* and *Lynce*, Connecticut law made the award of good-time credit "a discretionary matter." *Id.* at 66. In addition, however, the court held that the new directive "was not applied retroactively" to Abed, because "[b]y its terms, [it] concerned ongoing and future—not past—conduct." *Id.* That way of analyzing the gang-conduct rule at issue in *Abed* for ex post facto purposes cannot be reconciled with the Ninth Circuit's decision in this case.

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[8] Although Abed's federal habeas claim was decided after AEDPA went into effect, the Second Circuit's decision does not mention the new Act and addresses the issues before the court de novo.

Similarly, the Fourth Circuit held that a new statute that could result in the forfeiture of good-conduct credits for refusal to provide a DNA sample could be applied to all Virginia prisoners, including those who committed their underlying crimes before the DNA requirement was enacted. *Jones v. Murray*, 962 F.2d 302, 308-310 (4th Cir. 1992). The court explained that reasonable prison regulations fall within a prisoner's anticipated sentence, and "since a prisoner's original sentence does not embrace a right to one set of regulations over another, reasonable amendments, too, fall within the anticipated sentence of every inmate." *Id.* at 309-310. Accordingly, the Ex Post Facto Clause did not forbid imposing administrative punishments, including "the denial of good-time credits," on any current prisoner who refused to comply. *Id.* at 310.

While *Jones* was pending in the courts, Virginia prison officials adopted administrative regulations providing for a potential loss of good-time credits as a sanction for refusing to provide a DNA sample, and later amended the regulations to increase the amount of good-time credit that could be lost. *Ewell v. Murray*, 11 F.3d 482, 484-485 (4th Cir. 1993). The Fourth Circuit confirmed its decision in *Jones* that the new regulations could be applied to all prisoners, and further rejected any Ex Post Facto Clause objection to the regulatory amendment increasing the potential forfeiture of credits. *Id.* at 486-487. The court began by noting that inmates who complied with all prison regulations would not spend more time in prison after adoption of the new provisions than they would have before. *Id.* at 486. It thus framed the question before it as "whether prison officials may, consistent with the Ex Post Facto Clause, reasonably increase the penalties for prospective violations by inmates of reasonable

prison regulations when the penalties may involve the loss of good conduct time credits." *Id.* The court concluded that such an increase is permissible because it "does not add punishment for the original crime for which the inmate was incarcerated." *Id.* "While an inmate has the right, as of the time of his sentence, to expect the good conduct credits then defined for good behavior, he has no right to a particular set of prison regulations adopted to maintain the order, safety, and efficiency of the prison." *Id.* That holding likewise cannot be reconciled with the Ninth Circuit's holding in this case that the Constitution forbids California from applying to all current inmates a change in prison rules that decreases a prisoner's opportunity to earn good-time credits during a period of ongoing misconduct.

4. The decision below subjects California prison officials to conflicting legal directives from the state and federal courts. Implementing it would also interfere substantially with the ability of California—and other States in the Ninth Circuit—to administer state prisons, deter serious in-prison misconduct, and respond to evolving penological challenges. If the Court does not reverse the judgment below based on the court of appeals' improper failure to follow AEDPA, then it should address the second question presented in order to provide state officials with uniform guidance on these important issues.

"Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). "Beyond question, the authority of States over the administration of their

criminal justice systems lies at the core of their sovereign status." *Oregon v. Ice*, 555 U.S. 160, 170 (2009). Federal courts "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977). "[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). *See also Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (appropriate deference must be given to "the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement"); *McGinnis v. Royster*, 410 U.S. 263 (1972) (rejecting equal protection challenge based on different application of good-time credits in context of presentence jail custody and prison incarceration).

In discharging their complex and difficult responsibilities, California prison officials must seek to comply both with state statutes and with relevant decisions of the state and federal courts. In the specific context at issue here, before the decision in this case, officials had been directed by the state Legislature to implement the 2010 amendment to section 2933.6; told by the state courts that applying that amendment uniformly to all inmates was consistent with the federal and state Constitutions; and indeed assured by the Ninth Circuit that those state decisions were not contrary to any clearly established federal law. *See, e.g., In re Efstathiou, supra*; *Nevarez, supra*. More generally, for thirty years they had been able to rely on the California Supreme Court's assurance, in *In re Ramirez*, that the Ex Post Facto Clause did not prohibit uniform application to current inmates of reasonable changes

to prison conduct regulations, even if those changes could affect the credit-earning ability of an inmate who engaged in future misconduct. *See Ramirez*, 39 Cal. 3d at 937.

The decision below conflicts with that previously clear and uniform guidance, and puts prison officials in an untenable situation. The statutory command in section 2933.6 remains in place, as do the state decisions specifically rejecting federal ex post facto challenges to its uniform implementation. The state courts have full authority to interpret and apply federal law, and their precedential holdings on federal questions are no less binding on state officials than those of the lower federal courts, including the Ninth Circuit. *Cf. People v. Bradley*, 1 Cal. 3d 80, 86 (1969) ("On a federal question, the decisions of the United States Supreme Court are binding on state courts. However, the decisions of the lower federal courts, while persuasive, are not binding on us.") On the other hand, no state official will normally wish to be in the position of seeming to ignore or act counter to directly applicable Ninth Circuit authority—particularly when that court's decisions could control the result in future federal civil litigation, subject only to the possibility of later intervention by this Court. California officials thus have a clear and practical need either to have the Ninth Circuit's judgment in this case reversed, and the decision vacated, under AEDPA, thus returning the situation to what it was before the decision, or for this Court to address the merits and provide definitive guidance.

Moreover, the answer to the ex post facto question here, which has been thrown into doubt by the decision below, is one of general importance. Most States use some form of good-conduct credits in administering their sentencing and prison systems,

and empirical studies point to the benefits of such systems in areas such as prison discipline, recidivism, and corrections budgets. Michael O'Hear, *Good Conduct Time for Prisoners: Why (and How) Wisconsin Should Provide Credits Toward Early Release*, 98 Marq. L. Rev. 487, 530, 542 (2014). The court of appeals' decision here, if implemented, would substantially interfere with the ability of many States to use their credit schemes to deter serious in-prison misconduct, and to adapt their prison regulations and credit systems over time in response to changing circumstances.

While this case involves the gang-validation provision of Penal Code section 2933.6, the logic of the decision below reaches much further. Section 2933.6 limits an inmate's credit-earning status based on many serious in-prison infractions that lead to a need for segregated housing, including murder, assault, battery, rape, and hostage-taking. Cal. Penal Code § 2933.6. Under the Ninth Circuit's reasoning, the Constitution bars the Legislature and prison officials from imposing these credit limitations on any inmate who committed his underlying crime before section 2933.6 was enacted in 1992.

In addition, the decision below does not appear limited to changes to section 2933.6 or similar statutes or regulations affecting the ability to earn credits in the future based on in-prison behavior. Its logic also appears to extend to changes to *any* rule governing in-prison misconduct for which credits already earned may be forfeited. App. 20a (addressing both changes in credit-earning status and revocation of existing credits). The net result would seem to be that any change to a prison disciplinary system affecting the earning or forfeiture of good-time credits could be applied only to future generations of prisoners who commit new crimes at

some point after the prison-conduct rule is changed. That is not a workable rule. As the California Supreme Court recognized long ago, "[f]rom the standpoint of prison order, it is simply infeasible to run a prison in which some inmates are wholly or partially immune from punishment for conduct for which others receive serious penalties." *Ramirez*, 39 Cal. 3d at 937.

The court of appeals' decision would prohibit the State from enacting new statutes or regulations defining new categories of prison misconduct subject to credit forfeiture in response to evolving penological challenges, and applying those statutes or regulations to the same inmate population that required the state to enact the statute or regulation in the first place. For example, inmates now routinely smuggle cellphones into prisons to engage in various criminal activities, including ordering the killing of witnesses or rival gang members. Smuggling cellphones into prison has become more prevalent over time as the devices themselves have become more accessible and advances in technology have produced smaller, more easily concealed phones. *See* Dr. Tod W Burke and Dr. Stephen S. Owen, *Cell Phones as Prison Contraband*, FBI Law Enforcement Bulletin (July 2010), https://leb.fbi.gov/2010/july/cell-phones-as-prison-contraband.

To combat this threat, effective October 6, 2011, the California Legislature added a new section to the state Penal Code, tripling the forfeiture of conduct credits from 30 to 90 days for any inmate found to possess a cellphone. Cal. Penal Code § 4576. Yet, the court of appeals' decision would immunize every person who committed his crime before October 6, 2011, from such increase—including the same prison population that, by its misconduct, required the state to increase the forfeiture.

The Ninth Circuit's decision effectively gives state prison inmates a constitutional *right* to engage in future serious in-prison misconduct without any consequence to the inmate's credit-earning status (or existing credits), so long as the inmate committed his underlying crime before adopting the rule defining the misconduct (or increasing its consequences). It is not fanciful to suppose that, if this decision becomes the operative law, sophisticated prison gangs would recruit inmates who, based on the timing of their commitment offense, can engage in specific misconduct with relative impunity. The Ex Post Facto Clause was not intended to lead to any such result, or to shield any prisoner from routine and reasonable prospective changes to the rules adopted by state legislatures and prison officials to regulate conduct in state prisons. *Cf., e.g., Weaver*, 450 U.S. at 29 (clause assures that legislative acts give fair warning of their effects).

These consequences of adopting the constitutional reasoning of the court below make the second question presented in this case potentially one of great practical importance. If the decision below is not reversed (and the court's opinion vacated) on AEDPA grounds, then the second question warrants plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated December 23, 2015

APPENDIX

FILED September 25, 2015

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANTONIO A. HINOJOSA, *Petitioner-Appellant*,
v.
DAVE DAVEY, Acting Warden, *Respondent-Appellee*.
No. 13-56012
D.C. No. 8:12-cv-00965-GAF-MRW

OPINION

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted
June 2, 2015—Pasadena, California
Filed September 25, 2015
Before: Ferdinand F Fernandez, Raymond C. Fisher, and Carlos T Bea, Circuit Judges.

Opinion by Judge Bea

OPINION

BEA, Circuit Judge:

Prison gangs threaten the safety and security of prisons and prisoners. California has sought to combat these threats—and punish prison-gang affiliation—by segregating prison-gang members and associates from the general prison population. To that end, California houses prison-gang members and associates in Security Housing Units (SHUs), maximum-security facilities in which prisoners are kept in solitary confinement for over 22 hours a day.

California also encourages good behavior among its prisoners with good-conduct credits that reduce prisoners' sentences. Most prisoners earn credits on a one-to-one basis—for one day of good conduct, they earn one day of credit. So, a prisoner who behaves well can potentially cut his sentence in half. But prisoners can also lose credits, or their credit-earning status can change, based on misconduct. Until 2010, prison-gang members and associates housed in SHUs earned credits at a reduced three-to-one rate. But California amended its penal code in 2010 to modify the credit-earning status of prison-gang members and associates in segregated housing. Those prisoners can no longer earn any credits, regardless their conduct. The amendment thus causes prison-gang members and associates housed in SHUs to serve a longer portion of their prison sentences than they would have under the old regime, effectively increasing their sentences. The issue here is whether the 2010 amendment violates the Ex Post Facto Clause of the United States Constitution when applied to a prisoner whose underlying criminal

offense was committed before that amendment's enactment. We conclude it does.

I

In 2003, petitioner–appellant Antonio A. Hinojosa pleaded guilty in California superior court to first-degree robbery (to which he admitted a firearm enhancement) and participation in criminal-street-gang activity. He was sentenced to 16 years of imprisonment.

In 2009, Hinojosa was "validated" as a "prison-gang associate" and transferred to the SHU at Corcoran. [1] Validation is the process by which inmates are classified as prison-gang members or associates.[2] Once validated, a prison- gang member

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[1] After this appeal was filed, the California Penal Code was amended to replace the term "prison gang" with "Security Threat Group," bureaucratese that is otherwise known by the abbreviation "STG." As such, Hinojosa is no longer a "prison-gang associate" but an "STG associate." For the purposes of this opinion, however, we use the old terminology, which is more accurate here, as STGs may include groups other than prison gangs. The Code also distinguishes between prison-gang members and associates; that distinction is irrelevant to our analysis.

[2] For an inmate to be validated as a prison-gang associate, the California Department of Corrections and Rehabilitations must recognize at least three reliable, documented bases ("independent source criteria items") for concluding that the inmate's background, person, or belongings indicate his active association with other validated prison-gang members or associates. See Cal. Code Regs., tit. 15, § 3378.2(b). At least one of those bases must constitute a direct link to a

(continued...)

or associate "is deemed to be a severe threat to the safety of others or the security of the institution and will be placed in a SHU for an indeterminate term." Cal. Code Regs. tit. 15, § 3341.5(c)(2)(A)(2) (2009). At the time Hinojosa was validated, there were two ways validated prison-gang members and associates could get out of the SHU. The first is going "inactive." An inactive inmate is one who has not been involved in prison-gang activity for a minimum of six years. *Id.* § 3378(e) (2009). Once deemed inactive, the prison's Departmental Review Board may authorize an inmate's transfer out of the SHU, but that decision is discretionary. *See id.* § 3341.5(c)(5) (2009). The Board "is authorized to retain an inactive gang member or associate in a SHU based on the inmate's past or present level of influence in the gang, history of misconduct, history of criminal activity, or other factors indicating that the inmate poses a threat to other inmates or institutional security." *Id.* The second way to get out of the SHU is to "debrief"—what some prisoners might describe as "snitch." [3] The process has two steps: an interview phase and an observation phase. *Id.*§ 3378.1(a) (2009). In the

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(...continued)
current or former validated prison- gang member or associate. *Id.* The evidence presented against Hinojosa consisted of an envelope upon which was written the name of another validated prison-gang associate, a birthday card with gang symbols in it, photographs of Hinojosa's gang-related tattoos, and a report from an institutional gang investigator. Hinojosa does not challenge his validation as a prison-gang associate.

[3] In his petition in district court, Hinojosa asserted that inmates who choose to debrief put themselves and their families in jeopardy of retaliation by other gang members. That may be, but it does not affect our analysis.

interview phase, the inmate must provide staff with "information about the gang's structure, activities and affiliates," as well as "a written autobiography of [his] gang involvement, which is then verified by staff for completeness and accuracy." *Id.* § 3378.1(b)(2009). In the observation phase, inmates are observed for up to twelve months in segregated housing with other inmates undergoing the debriefing process. *Id.* § 3378.1(c) (2009).[4]

Under the version of California Penal Code § 2933.6 in effect at the time of Hinojosa's 2003 conviction and 2009 validation, he was eligible to earn good-conduct credits while housed in the SHU, albeit at a rate lower than prisoners housed in the general population. See Cal. Penal Code § 2933.6(a), (b) (2009); *In re Efstathiou*, 200 Cal.App.4th 725, 728 (2011). But effective January 25, 2010, § 2933.6 was amended to eliminate accrual of credits for inmates, such as Hinojosa, who had been transferred to the SHU upon validation as a prison-gang member or associate. See Cal. Penal Code § 2933.6(a), (b) (2010).

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[4] After briefing of this appeal concluded, California amended its regulations to introduce a third means by which validated prison-gang members and associates can get out of the SHU: the Step Down Program. *See* Cal. Code Regs. tit 15, § 3378.3(a) (2015). The Step Down Program is "an incentive based multi-step process for the management of [prison- gang] affiliates designed to monitor affiliates and assist with transition for return to [the] general population." *Id.* Like debriefing, completing the Step Down Program is a lengthy process that does not entail immediate restoration of a prisoner's credit-earning status. *See id.* §§ 3000, 3341.5(c)(5). 3378.3 (2015). The addition of the Step Down Program to the regulations does not change our analysis.

The amendment did not revoke any credits Hinojosa earned before the effective date of the amendment; it prevented him from accruing any further custody credits while housed in the SHU. As a result of this change in credit-earning status, Hinojosa's minimum release date was extended one year, from September 27, 2015, to September 27, 2016.

After exhausting his administrative remedies, Hinojosa filed a petition for writ of habeas corpus in the Superior Court of California challenging the application of amended § 2933.6 to change his credit-earning status. As recounted by the superior court, Hinojosa presented two claims:

1. The California Department of Corrections and Rehabilitation's retroactive application of recently amended Penal Code § 2933.6 to restrict and/or deny petitioner's eligibility for prison conduct credit violates the terms of petitioner's plea agreement and constitutional right to due process.

2. The California Departments of Corrections and Rehabilitation has unlawfully validated petitioner as a prison gang associate resulting in the retroactive application of recently amended Penal Code § 2933.6 to restrict and/or deny petitioner's eligibility for prison conduct credit in violation of petitioner's constitutional right to due process and the constitutional proscription against ex post facto legislation.

The superior court addressed these two claims separately, providing "separate and independent grounds" for denying each. As to the first claim, the

superior court held that Hinojosa's plea agreement did not "contain an express promise or guarantee" regarding his credit-earning status and thus that the application of amended § 2933.6 to Hinojosa did not violate the terms of his plea agreement or violate due process. As to the ex post facto claim, the superior court denied it "on grounds [Hinojosa] ha[d] not sought review of his claim of error in the proper judicial venue." The superior court denied his petition.

Hinojosa petitioned the California Court of Appeal and then the Supreme Court of California for a writ of habeas corpus, raising the same claims. Both courts denied his petitions without opinions.

Hinojosa then filed pro se a petition for writ of habeas corpus in the United States District Court for the Central District of California. In his petition, he claimed (1) application of amended § 2933.6 to change his credit earning status violated the Ex Post Facto Clause, and (2) ineffective assistance of counsel for failing to inform him of the chance he would lose his credit-earning status. In his report and recommendation, Magistrate Judge Michael R. Wilner analyzed those claims under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d), and recommended denial of Hinojosa's petition. As to the ex post facto claim, Magistrate Judge Wilner concluded the California Superior Court had not unreasonably applied federal law in denying Hinojosa's claim

> because the change in California law neither caused a prisoner to lose earned credits nor punished a prisoner for past

> conduct. Rather, the statute serves to prevent an inmate from earning additional credits based on his "continued status as an active gang member or associate": an inmate may rectify this by dropping out of the gang and cooperating with prison officials.

Magistrate Judge Wilner rejected Hinojosa's ineffective-assistance-of-counsel claim because "no reasonable criminal defense attorney could be faulted for failing to anticipate and advise a client about a future change in the law governing prison credits."

District Judge Gary A. Feess adopted Magistrate Judge Wilner's report and recommendation in full, denied Hinojosa's petition, and dismissed the action with prejudice. Judge Feess denied Hinojosa's request for a certificate of appealability as to either of his claims. Hinojosa timely petitioned us for a certificate of appealability, which we granted only as to "whether the 2010 amendment to California Penal Code § 2933.6, which deprives a prisoner of a future opportunity to earn an earlier release, violates the Ex Post Facto Clause." This appeal followed. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(c).

II

We review de novo the district court's denial of a petition for a writ of habeas corpus. *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004). And we review de novo the district court's determination that AEDPA applies to a petitioner's claim. *See Id.* at 965.

III

Hinojosa is not the first California prisoner to challenge amended § 2933.6 under the Ex Post Facto Clause. In *Nevarez v. Barnes*, 749 F.3d 1124 (9th Cir. 2014), *cert. denied sub nom. Nevarez v. Ducart*, U.S. __, 135 S. Ct. 295 (2014), we considered this same question on similar facts. There, we held that AEDPA barred us from granting *Nevarez* relief because the California courts' denial of his ex post facto claim was not "an objectively unreasonable application of clearly established federal law" as determined by the Supreme Court of the United States. 749 F.3d at 1128; see 28 U.S.C. § 2254(d)(1). If AEDPA applies here, we are bound by our decision in *Nevarez* and must affirm the district court's denial of Hinojosa's petition. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). If not, we must consider the merits of his petition.

AEDPA bars us from granting a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). Hinojosa contends that no state court decided his ex post facto claim "on the merits" and thus that AEDPA does not apply. We agree.

The superior court did not decide Hinojosa's ex post facto claim on the merits. It denied the claim because Hinojosa filed it "in the [im]proper judicial

venue." The state conceded as much at oral argument. But the state cites *Harrington v. Richter*, 562 U.S. 86 (2011), and *Johnson v. Williams*, 568 U.S. , 133 S. Ct. 1088 (2013), for the proposition that we must presume the California Supreme Court decided Hinojosa's ex post facto claim on the merits when it summarily denied his petition. That argument fails to comprehend the relationship between *Richter*, whereby we must presume state courts decide federal claims on the merits, see 562 U.S. at 99–100, and *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), which directs us to consider the last reasoned decision of the state courts, *see id.* at 806. Where the last reasoned state-court decision rejects a federal claim solely on procedural grounds, any presumption that a subsequent summary denial decided the claim on the merits is rebutted. *See James v. Ryan*, 733 F.3d 911, 915–16 (9th Cir. 2013) cert. denied, 572 U.S. , 134 S. Ct. 2697 (2014); *see also Williams*, 133 S. Ct. at 1094 n.1 ("Consistent with our decision in *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991), the Ninth Circuit 'look[ed] through' the California Supreme Court's summary denial of Williams' petition for review and examined the California Court of Appeal's opinion, the last reasoned state-court decision "). Here, the last reasoned decision is that of the superior court, which denied Hinojosa's ex post facto claim solely on the ground of improper venue. That determination is not a determination "on the merits." 28 U.S.C. § 2254(d). So, we are not bound by AEDPA.

Nonetheless, if a state court dismisses a federal claim on an independent state procedural ground that is firmly established and regularly followed, we normally will not consider the claim. *Beard v.*

Kindler, 558 U.S. 53, 55, 60–61 (2009). But the state has not raised a state procedural ground as a defense at any stage of Hinojosa's federal proceedings. The defense is thus waived. *See Trest v. Cain*, 522 U.S. 87, 89 (1997) ("[P]rocedural default is normally a defense that the State is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter." (internal quotation marks and brackets omitted)). And although we may raise procedural default sua sponte, *Windham v. Merkle*, 163 F.3d 1092, 1100–01 (9th Cir. 1998), we decline to do so here. Hinojosa raises a serious question about whether the superior court's dismissal of his claim for improper venue is, in fact, a firmly established and regularly followed rule. *See In re Oluwa*, 255 Cal. Rptr. 35, 37 (Cal. Ct. App. 1989) (holding habeas petition challenging denial of custody credits "is not related to the conditions of . confinement" and was properly brought in the district of conviction); *Griggs v. Superior Court*, 16 Cal. 3d 341, 347 (1976) (holding habeas petition should be transferred, not dismissed, for improper venue). We will not make the state's arguments for it, even only to rebut them. So, we turn to the merits.

IV

"No State shall pass any ex post facto Law " U.S. Const. art. I, § 10, cl. 1. "To fall within the ex post facto prohibition, a law must be retrospective—that is, 'it must apply to events occurring before its enactment'—and it 'must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce v. Mathis*, 519 U.S.

433, 441 (1997) (citations omitted). We address these two prongs in turn.

A

A law is retrospective if it "appl[ies] to events occurring before its enactment." *Id.* at 441 (citation omitted). The Supreme Court has instructed that the "critical question is whether the law changes the legal consequences of acts completed before its effective date." *Weaver v. Graham*, 450 U.S. 24, 31 (1981).[5] But which acts? Hinojosa argues that the

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[5] In *Weaver*, the governing law when petitioner Weaver committed and pleaded guilty to second degree murder permitted all prisoners to earn conduct credits at certain rates. *Id.* at 25–26. That rate was later reduced, and the new rates were applied to all prisoners regardless of when they committed their underlying offenses. *Id.* at 26–27. As a result, all prisoners' minimum release dates were effectively increased, including Weaver's. *Id.* Weaver petitioned the Supreme Court of Florida for a writ of habeas corpus, claiming the application of the new rates to him violated the Ex Post Facto Clause *Id.* at 27. The Florida Supreme Court denied his petition. *Id.* at 27–28.

The United States Supreme Court reversed. For the purposes of retrospectivity, the Court compared the date Weaver committed his underlying criminal offense and the date the new rates went into effect. *Id.* at 31–32; see also *Id.* at 32 ("[A] prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed."). The Court then concluded that the new rates disadvantaged Weaver by increasing his prison sentence. *Id.* at 33. The Court concluded "the new provision constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its

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relevant conduct is the criminal conduct for which he is incarcerated. The state contends it is Hinojosa's continued prison-gang association.

Our precedent supports Hinojosa's position. Altering a prisoner's ability to earn credits affects the length of his prison term and therefore affects the measure of punishment attached to the original crime. *See United States v. Paskow*, 11 F.3d 873, 879 (9th Cir. 1993) ("[A statute], which forfeited good-time credits upon revocation of parole, violated the prohibition on ex post facto laws because it constituted 'a sanction that extends the time remaining on petitioner's original sentence' rather than a punishment for 'the second offense.' " (quoting *Beebe v. Phelps*, 650 F.2d 774, 776 (5th Cir. Unit A July 1981))); *see also Weaver*, 450 U.S. at 32 ("[A] prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed."). For that reason, we have consistently looked to the prisoner's underlying criminal conduct for the purpose of determining whether a law is retrospective. *See Paskow*, 11 F.3d at 877 ("These two factors must be assessed in connection with the date of the defendant's offense, not of his conviction or sentencing."); *Watson v. Estelle*, 886 F.2d 1093, 1096 (9th Cir. 1989) ("The key

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enactment. This result runs afoul of the prohibition against ex post facto laws." *Id.* at 35–36.

ex post facto inquiry is the actual state of the law at the time the defendant perpetrated the offense."); *see also Weaver*, 450 U.S. at 31 (asking whether the statute at issue "applies to prisoners convicted for acts committed before the provision's effective date"). That analysis holds true even where the prisoner commits some intervening misconduct that triggers a change in his credit-earning status. *See Paskow*, 11 F.3d at 878–79 (citing *Greenfield v. Scafati*, 277 F Supp. 644, 644–45 (D. Mass. 1967), aff'd, 390 U.S. 713 (1968) (per curiam)).

Greenfield, which we have adopted as controlling authority,[6] illustrates this principle. As we described that case in *Paskow*:

> In Greenfield, a defendant who was incarcerated following revocation of his parole challenged a statute that prohibited any state parole violator from receiving good- conduct credits during his first six months in custody following [parole] revocation. At the time the defendant committed his underlying crime, all prisoners, including parole violators, could

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[6] Although Greenfield is a decision by a three-judge panel from the District of Massachusetts, the Supreme Court summarily affirmed the decision, and we have since adopted it as binding circuit precedent. *See Paskow*, 11 F.3d at 878. As such, we are bound by Greenfield here, notwithstanding our holding in *Nevarez v. Barnes* that Greenfield "does not qualify as 'clearly established federal law [as determined by the Supreme Court of the United States]' for purposes of AEDPA," 749 F.3d at 1129. As we held above, AEDPA does not apply to Hinojosa's ex post facto claim.

> accumulate good-conduct credits from the beginning of their incarceration. The new statute was adopted after the defendant committed his underlying crime, but before he committed the offense for which his parole was revoked. The three-judge court held that application of the statute to the defendant violated the ex post facto clause, because the statute prevented him from being released as early as he might have been had he been permitted to amass good-conduct credits under the statute in effect *at the time he committed the underlying crime*. Thus, according to the three-judge court and according to the Supreme Court, the statute operated retrospectively and to his detriment. As the three-judge court stated, the effect of the statute was to "extend[] his sentence and increas[e] his punishment" beyond the amount he expected or had notice of when he committed his underlying crime.

Paskow, 11 F.3d at 878–79 (citations omitted). The panel thus concluded: "Because parole eligibility is part of the sentence for the underlying offense, its terms and conditions are fixed at the moment the underlying offense is complete. Therefore, like the length of a term of incarceration, the conditions affecting parole eligibility cannot be retrospectively altered." *Id.* at 879.

The state contends that our decision in *Hunter v. Ayers*, 336 F.3d 1007 (9th Cir. 2003), establishes that the relevant conduct here is Hinojosa's in-prison

misconduct, not his underlying criminal conduct.[7] We disagree. The panel in *Hunter* assumed without deciding that the relevant conduct for the purposes of retrospectivity was Hunter's in-prison misconduct. *See* 336 F.3d at 1012–13. But the panel neither raised nor answered that question. Nor did it have to: regardless whether the relevant date was the date of his in-prison misconduct or the date of his underlying criminal offense, the regulation violated the Ex Post Facto Clause as applied to Hunter.[8] As such, it is no

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[7] In *Hunter*, petitioner Hunter challenged prison regulations that retroactively removed his ability to have conduct credits restored after an infraction. 336 F.3d at 1008–09. Hunter was caught drinking "pruno" (prison wine), a disciplinary offense. *Id.* at 1008. He was docked 120 days of good-conduct credits. *Id.* Under the regulations in place at the time he committed the offense, if he served six months following the offense without another disciplinary offense, half of his forfeited credits would be restored as of right. *Id.* at 1010. But after he committed the pruno offense, the regulations were changed to eliminate restoration of forfeited credits for offenses like Hunter's. *Id.* Hunter challenged the application of the new regulations to him as violating the Ex Post Facto Clause. *Id.* at 1011. Hunter petitioned for a writ of habeas corpus under 28 U.S.C. § 2241, which the district court granted. We affirmed, holding that application of the amended regulations to eliminate restoration of Hunter's credits violated the Ex Post Facto Clause. *Id.* at 1013.

[8] But that distinction matters here. Although Hinojosa's and Hunter's situations seem similar (Hinojosa was validated and transferred to the SHU, then the statute was amended; Hunter committed in-prison misconduct, then the regulation was amended), a key difference distinguishes them. Hunter's pruno violation was completed when he drank the pruno. But according to the California courts, a validated prison- gang associate commits the continuing offense of associating with a prison gang until he debriefs or becomes inactive. *See In re*

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surprise that *Hunter* did not distinguish or even cite any of the cases relevant to that question. To the extent *Hunter's* dicta *does* identify the in-prison infraction as the relevant conduct, we hold that dicta is not "well-reasoned"—indeed, the opinion provides no reasoning—and we decline to follow it. *Cf. United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc). Rather, we are bound by the express holdings of *Paskow* and *Weaver* A prisoner's eligibility for early release—whether by means of good-conduct credits or parole—is part of his underlying criminal sentence. *See Weaver*, 450 U.S. at 31–32; *Paskow*, 11 F.3d at 879. And where a prisoner's sentence is effectively increased by new regulations that alter his credit-earning status, that alteration "changes the legal consequences" of his underlying criminal conduct. *Weaver*, 450 U.S. at 31. We therefore hold, in accord with *Paskow* and *Weaver*, that the date relevant to our retrospectivity analysis is the date of the prisoner's underlying criminal conduct. *See Paskow*, 11 F.3d at 878–79; *Weaver*, 450 U.S. at 30–32.

(...continued)
Sampson, 197 Cal. App. 4th 1234, 1242–43 (2011). So, under California law, every moment Hinojosa goes without debriefing is a continuation of his misconduct. And we are bound by the California courts' interpretation of California law. *See Bradshaw v. Ricky*, 546 U.S. 74, 76 (2005) (per curiam). Accordingly, if the relevant date is the date of the in-prison misconduct, and Hinojosa was properly found to have committed in-prison misconduct by affiliating with a prison gang while in prison, § 2933.6 is not retrospective because until there is evidence that he has disaffiliated from that gang, he is continuing his in-prison misconduct.

Applying that principle here, we conclude that amended § 2933.6 is retrospective as applied to Hinojosa. To borrow *Paskow's* language: "At the time [Hinojosa] committed his underlying crime [validated gang associates housed in a SHU] could accumulate good-conduct credits from the beginning of their incarceration." *Paskow*, 11 F.3d at 878. Amended § 2933.6 "was adopted after [Hinojosa] committed his underlying crime" and "prevented [Hinojosa] from being released as early as he might have been had he been permitted to amass good-conduct credits under the statute in effect at the time he committed the underlying crime." *Id.* (emphasis omitted). It thus "changes the legal consequences of acts completed before its effective date." *Weaver*, 450 U.S. at 31. [9]

In its answering brief, the state attempts to distinguish this case from *Paskow* and *Weaver* on the ground that amended § 2933.6

> punishes conduct that occurred after the commission of, or the conviction for, the punishable offense. Hinojosa's ineligibility for conduct credit accrual is not punishment for the offense of which he was convicted. . [I]t is punishment for gang-related conduct that occurred after January 25, 2010.

See also In re Sampson, 197 Cal. App. 4th at 1242 ("[P]etitioner's ineligibility for conduct

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[9] Although the record does not contain the date of Hinojosa's underlying criminal offense, it was certainly before he pleaded guilty to that conduct in 2003.

> credit accrual is not punishment for the offense of which he was convicted...It is punishment for gang-related conduct that continued after January 25, 2010.").

We do not question whether California can punish prison misconduct, including prison-gang-related misconduct, through administrative disciplinary procedures. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209, 222–23 (2005) (holding that administrative punishment does not implicate a liberty interest protected by the Fifth Amendment unless the punishment "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995))). And we acknowledge that most administrative punishments—for example, segregated housing, loss of visitation privileges, restricted (and unpleasant) diets, and reduced exercise or social time—generally will not implicate the Ex Post Facto Clause. So long as an administrative punishment is in place before a prisoner commits the punishable prison misconduct, imposition of such punishment does not change the legal consequences of any prior acts. But administrative punishments that effectively extend a prisoner's sentence—such as revocation of good-conduct credits or change in credit-earning status—are another story. A prisoner's term of imprisonment is punishment for his underlying criminal conduct. So, an administrative punishment that effectively extends a prisoner's sentence goes beyond punishing prison misconduct. It changes the legal consequences of his underlying criminal conduct. If that conduct was committed before the administrative punishment

was enacted, the punishment is retrospective. *See Weaver*, 450 U.S. at 32–33.[10]

The state is correct: Hinojosa's "gang-related misconduct" occurred after, and is separate from, his underlying crimes. But in punishing Hinojosa for his in-prison gang-related misconduct, the state has effectively increased his prison sentence for his underlying crimes. And it has done so by means of a regulation that was enacted after Hinojosa committed those crimes. Amended § 2933.6 is thus retrospective as applied to Hinojosa.

B

Not all retrospective laws are unconstitutional. A retrospective law does not violate the Ex Post Facto Clause unless it " 'disadvantage[s] the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce*, 519 U.S. at 441 (citation omitted). But an increase in punishment need not be an increase in the maximum term of imprisonment. As the Supreme Court explained in *Weaver*, a new regulation that changes an inmate's ability to earn good-conduct credits increases his punishment if the "new provision constricts the inmate's opportunity to earn early release." *Weaver*, 450 U.S. at 35–36.

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[10] Of course, the opposite is also true. If, at the time a prisoner commits his crime, regulations provide that prisoners may lose credit-earning status as a consequence of prison misconduct, there is no ex post facto violation.

Citing *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), the state argues that Hinojosa's risk of an increased sentence is "too attenuated" to rise to an ex post facto violation. 514 U.S. at 514. We disagree and distinguish *Morales*. Under the law in place when petitioner Morales murdered two people and pleaded guilty to those crimes, parole-eligible inmates were entitled to yearly parole-board hearings. *Id.* at 502–03. But while Morales was incarcerated, the state changed the law to "authorize[] the Board [of Parole Hearings] to defer subsequent suitability hearings for up to three years if the Board 'finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.' " *Id.* at 503 (citation omitted). At his first parole hearing in 1989, the board issued a reasoned decision finding it was not reasonable to expect that parole would be granted in the following years. *Id.*at 502–03. It scheduled Morales's next hearing for 1992. *Id.* at 503.

Morales filed a petition for habeas corpus in federal district court, which the district court denied. *Id.* at 504. We reversed, holding that "any retrospective law making parole hearings less accessible would effectively increase the [prisoner's] sentence and violate the ex post facto clause." *Id.* (citation omitted). The Supreme Court reversed us, drawing a clear distinction between cases like *Weaver*, where a retrospective law directly results in an increased prison sentence, and cases like *Morales*, where the amended statute "creates only the most speculative and attenuated risk of increasing the

measure of punishment attached to the covered crimes." *Id.* at 514.

This case falls under *Weaver*, not *Morales*. Whereas the amended statute in Morales did not change the "substantive formula" for reducing the statutory sentencing range or the standards for determining parole suitability, *Id.* at 507, amended § 2933.6 expressly alters the "substantive formula" for awarding good-conduct credits to prisoners, like Hinojosa, who have been validated as prison-gang members or associates. That change is not speculative; it has effectively increased Hinojosa's prison time by one year.

The state argues alternatively that Hinojosa is not disadvantaged by amended § 2933.6 because he "could always choose to opt out of a prison gang." If he did, the state suggests, he would be out of the SHU and back in the general population, earning credits at the same rate as everyone else. But it is not so easy. One does not simply "opt out" of a prison gang. Hinojosa cannot stop being a prison-gang associate in the eyes of the state unless he waits six years or debriefs. And aside from the fact that a prisoner who debriefs may claim to face death or serious injury at the hands of his former compatriots, the entire debriefing process can take well over a year. *See In re Sampson*, 197 Cal. App. 4th at 1240. The state has made no representation that Hinojosa would necessarily regain his prior credit-earning status upon beginning—or even completing—the process. Nor is there any provision by which Hinojosa could have the credits he is denied while debriefing reinstated once he completes the process.

But even if Hinojosa could easily opt out of his prison gang, the amended statute would still disadvantage him. We look at the effect amended § 2933.6 has on Hinojosa now, all other things being equal. The question is: if Hinojosa does not change his conduct—if he continues doing what he was doing before § 2933.6 was amended—is his prison time effectively lengthened? The answer is yes. Amended § 2933.6 thus works to his disadvantage. Were we to hold otherwise, the state could impose any manner of new requirements upon prisoners, who would have to comply simply to retain the same credit-earning status they enjoyed before the new requirements were enacted. *See Weaver*, 450 U.S. at 34–35 (rejecting the state's argument that Weaver could make up for his change in credit-earning status by performing "special behavior" to earn credits). Such a result would be irreconcilable with the Ex Post Facto Clause's protection against "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Id.* at 30. For just as retroactively altering "a prisoner's eligibility for reduced imprisonment" can disadvantage a prisoner, *id.* at 32, so can new conditions placed on that eligibility.

* * *

In conclusion, we emphasize what we hold today—and what we do not. We do not question whether the state can enact a new statute punishing in-prison misconduct. Nor do we question here whether the state can apply that new statute to

prisoners whose underlying criminal conduct predates the statute's enactment. But the state cannot use such a statute retroactively to effect an increase in prison time. The Ex Post Facto Clause forbids it.

V

Amended § 2933.6 violates the Ex Post Facto Clause as applied to prisoners, like Hinojosa, who committed their underlying criminal conduct before the amendment's enactment. Accordingly, we REVERSE the judgment of the district court and REMAND with instructions to GRANT the writ of habeas corpus. The writ will direct the state to release Hinojosa on the date he would have been released under the version of § 2933.6 that was in place prior to January 25, 2010. *See Weaver*, 450 U.S. at 36 n.22.

No petition for rehearing will be entertained and mandate shall issue forthwith. See Fed. R. App. P 2.

REVERSED and REMANDED.

FILED November 17, 2015

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANTONIO A. HINOJOSA, *Petitioner-Appellant*,

v.

CONNIE GIPSON, Warden, *Petitioner-Appellee*,

No. 13-56012
D.C. No. 8:12-cv-00965-GAF-MRW
Central District of California, Santa Ana

ORDER

Before: FERNANDEZ, FISHER and BEA, Circuit Judges.

The motion to recall the mandate is DENIED. Therefore, the petition for rehearing en banc will not be entertained.

FISHER, Circuit Judge, concurring:

Whether the state has demonstrated "exceptional circumstances" justifying recall of the mandate is a close question. *See Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988). The policy of this court is "that time should be allowed after entry of judgment for the filing of a petition for rehearing en banc." Gen. Order 4.6(a). We found "[e]xceptional circumstances" that justified issuing the mandate forthwith, *see* Gen. Order 4.6(b), depriving the state of the opportunity to file a

petition for rehearing through no fault of its own. The emergency situation that caused us to issue the mandate forthwith has now abated, so no party would suffer undue prejudice were the state's motion granted.

Nonetheless, having considered the totality of the circumstances, and given that the state's proposed petition for rehearing en banc lacks merit, I agree with my colleagues that this is not "the exceptional case requiring recall of the mandate in order to prevent an injustice." *Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996) (quoting *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977)). I therefore concur in the order denying the motion to recall the mandate.

FILED February 3, 2014

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANTONIO A. HINOJOSA, *Petitioner-Appellant*,

v.

CONNIE GIPSON, Warden, *Petitioner-Appellee*,

No. 13-56012
D.C. No. 8:12-cv-00965-GAF-MRW
Central District of California, Santa Ana

ORDER

Before: BERZON and CHRISTEN, Circuit Judges.

The request for a certificate of appealability is granted with respect to the following issue: whether the 2010 amendment to California Penal Code § 2933.6, which deprives a prisoner of a future opportunity to earn an earlier release, violates the Ex Post Facto Clause. See 28 U.S.C. § 2253(c)(3); see also 9th Cir. R. 22-1(e). This issue is similar to that raised in Nevarez v. Lewis, Appeal No. 12-17060.

A review of this court's docket reflects that the filing and docketing fees for this appeal remain due. Within 21 days of the filing date of this order, appellant shall either (1) pay to the district court the $455.00 filing and docketing fees for this appeal and file in this court proof of such payment, or (2) file in this court a motion to proceed in forma pauperis, accompanied by a completed Form CJA 23. Failure to

pay the fees or file a motion to proceed in forma pauperis shall result in the automatic dismissal of the appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

If appellant moves to proceed in forma pauperis, appellant may simultaneously file a motion for appointment of counsel.

The Clerk shall serve a copy of Form CJA 23 on appellant.

If appellant pays the fees, the following briefing schedule shall apply: the opening brief is due April 8, 2014; the answering brief is due May 8, 2014; the optional reply brief is due within 14 days after service of the answering brief. If appellant files a motion to proceed in forma pauperis, the briefing schedule will be set upon disposition of the motion.

If Connie Gipson is no longer the appropriate appellee in this case, counsel for appellee shall notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P 43(c).

FILED May 15, 2013

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV 12-965 GAF (MRW)

ANTONIO A. HINOJOSA, Petitioner,
vs.
CONNIE GIPSON, Warden, Respondent.

JUDGMENT

Pursuant to the Order Accepting Findings and Recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the petition is denied and this action is dismissed with prejudice.

DATE: May 15, 2013

S/ Gary Feess
HON. GARY A. FEESS
UNITED STATES DISTRICT JUDGE

FILED May 15, 2013

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV 12-965 GAF (MRW)

ANTONIO A. HINOJOSA, Petitioner,
vs.
CONNIE GIPSON, Warden, Respondent.

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court reviewed the petition, the records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report to which Petitioner has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

IT IS ORDERED that Judgment be entered denying the petition and dismissing this action with prejudice.

Dated: May 15, 2013

S/ Gary Feess
HON. GARY A. FEESS
UNITED STATES DISTRICT JUDGE

FILED March 28, 2013

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV 12-965 GAF (MRW)

ANTONIO A. HINOJOSA, Petitioner,
v.
CONNIE GIPSON, Warden, Respondent.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Gary A. Feess, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY OF RECOMMENDATION

This is a state habeas action. Petitioner pled guilty to robbery and street terrorism charges. He contends that a post-conviction change in state law regarding the calculation of good time credits violates the Ex Post Facto Clause. Petitioner also claims that his lawyer provided ineffective assistance of counsel at the time of the guilty plea by failing to advise him about the possibility of a future change in the law regarding the calculation of credits.

The Court concludes that these arguments are insufficient to justify relief. The Court therefore recommends that the petition be denied..

II. FACTS AND PROCEDURAL HISTORY

In 2003, Petitioner pled guilty to robbery and street terrorism charges.

Pursuant to a plea agreement, Petitioner agreed to a sentence of 16 years in prison.

In 2010, California Penal Code section 2933.6 became effective. That statute limited a prisoner's eligibility to earn good time credits toward early release from custody if the prisoner had been validated as a prison gang member or was assigned to segregated housing due to misconduct. The statute applies to the future earning of credits, but does not eliminate credits that an inmate previously earned.

Petitioner was validated as a member of a prison gang in 2009 and placed in segregated housing. Before the statute's enactment, Petitioner anticipated that he would be released in 2015. However, after the change in law in 2010, prison officials informed Petitioner that his release would be in 2016 due to his inability to earn additional good time credits.

Petitioner sought habeas relief in the state courts. The state superior court concluded that there was no violation of Petitioner's original plea agreement that could lead to relief. (Lodgment # 4.) The state appellate and supreme courts denied relief

on a variety of claims without comment. This federal habeas action followed.[1]

III. DISCUSSION

A. Standard of Federal Court Review Under AEDPA

Petitioner's claims are subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d).

In a habeas action, this Court reviews the state court's last reasoned decision. Maxwell v. Roe, 628 F.3d 486, 495 (9th Cir. 2010). Here, the Orange

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[1] The Court previously denied without prejudice the Attorney General's motion to dismiss the federal petition as untimely. The Attorney General did not renew the dismissal request, and responded to the merits of the petition instead.

County Superior Court's opinion (Lodgment # 4) stands as the last reasoned decision for some of Petitioner's claims. As to Petitioner's remaining claims, where the state court issued no reasoned decision, this Court must perform an "independent review of the record to ascertain whether the state court decision was objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003) (quotation omitted). Nevertheless, such a decision is presumed to be on the merits of Petitioner's claims, and is reviewed for its reasonableness under AEDPA. Harrington v. Richter, __U.S.__, 131 S. Ct. 770, 784 (2011).

Overall, Section 2254(d) presents "a difficult to meet [ ] and highly deferential standard for valuating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, __U.S.__, 131 S. Ct. 1388, 1398 (2011) (quotations omitted). On habeas review, AEDPA places on Petitioner the burden to show that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 131 S. Ct. at 786-87.

Put another way, a state court determination that a claim lacks merit "precludes federal habeas relief so long as fairminded jurists could disagree" on the correctness of that ruling. Richter, 131 S. Ct. at 786. Federal habeas corpus review therefore serves as "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." (Id.)

B. Ex Post Facto Claim

The Ex Post Facto Clause prohibits the enactment of a law that punishes an act not punishable at the time it was committed, or imposes additional punishment than prescribed when the act was committed. For a law to violate the ex post facto prohibition, "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29 (1981). A change in the law is disadvantageous if it is "more onerous than the law in effect on the date of the offense. Id. at 30-31. A statute that retroactively revokes previously-awarded credits violates the Ex Post Facto Clause, as it has "the effect of lengthening [the prisoner's] period of incarceration." Lynce v. Mathis, 519 U.S. 433, 443, 447 (1997) (statute "did more than simply remove a mechanism that created an opportunity for early release") (emphasis in original).

To date, no federal court has found Section 2933.6 to be unconstitutional. See, e.g., Corral v. Gonzalez, No. CV 12-1315 LJO (SKO), 2013 WL 635933 24 (E.D. Cal. Feb. 20, 2013); Smith v. Holland, No. CV 12-1529 BAM, 2012 WL 255387366 (E.D. Cal. Nov. 1, 2012); Munoz v. Lopez, No. CV 12-1180 BAM, 2012 WL 3260475 (E.D. Cal. Aug. 8, 2012); Saavedra v. Cate, No. CV 12-796 GSA, 272012 WL 1978846 (E.D. Cal. June 1, 2012). All of these courts concluded that the change in California law neither caused a prisoner to lose earned credits nor punished a prisoner for past conduct. Rather, the statute serves to prevent an inmate from earning additional credits based on his "continued status as

an active gang member or associate": an inmate may rectify this by dropping out of the gang and cooperating with prison officials. Corral, 2013 WL 635933, at *8.

The Court agrees. Petitioner has not lost the good time credits that he earned before the change of the statute. As a result, his release date will be calculated based on those credits. Although the Penal Code was revised after he was found to be a gang member, Petitioner had the opportunity to renounce his gang affiliation – and resume the favorable earning of release credits – if he choses to do so. The change of statute therefore has not extended the term of his incarceration or served to punish his past conduct in prison. Petitioner certainly will not serve longer than the 16-year prison term originally imposed upon him as reduced by his earned credits. The state courts did not err in rejecting his ex post facto challenge to the statute.

C. Ineffective Assistance of Counsel Claim

Petitioner contends that his lawyer provided ineffective assistance of counsel by failing to advise Petitioner at the time of his plea that Petitioner might not earn the full amount of good time credits under then-existing law.

To establish an ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668 (1984), "a defendant must show both deficient performance by counsel and prejudice." Knowles v. Mirzayance, 556 U.S. 111, 112 (2009). A reviewing court applies this standard in all contexts, including

advice regarding a plea agreement. Premo v. Moore, __U.S.__, 131 S. Ct. 733 (2011). Deficient performance is defined as representation that falls below an objective standard of reasonableness. Strickland, 466 U. S. at 688. As to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Padilla v. Kentucky, __U. S.__, 130 S. Ct. 1473, 1482 (2010) (quotation omitted). "Failure to satisfy either prong of the Strickland test obviates the need to consider the other." Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002). The standards created by Strickland and Section 2254(d) are both "highly deferential"; when the two apply in tandem, "review is doubly so." Richter, 131 S. Ct. at 788 (quotation omitted). Under such a review, a habeas court must determine "what arguments or theories supported or, as here, could have supported, the state court's decision" to reject the ineffective assistance claim, even in the absence of a reasoned opinion from that court. Id. at 786 (emphasis added).

Further, there is a fundamental interest in the finality of guilty pleas. United States v. Timmreck, 441 U.S. 780 (1979). If a guilty plea is "too easily set aside," the basic principles of acknowledging guilt and accepting responsibility under the law "erode." Premo, 131 S. Ct. at 741. Courts "must have assurance that a plea will not be undone years later because of infidelity to the requirements of AEDPA and the teachings of Strickland." Id. at 742. "The added uncertainty that results when there is no extended, formal record and no actual history to show how the charges have played out at trial works

against the party alleging inadequate assistance." Id. at 745.

Petitioner pled guilty in 2003. His plea agreement made no express reference or guarantee regarding the rate by which he would earn good time credits while in custody. (Lodgment # 4 at 2.) The statutory change at issue in this case occurred approximately seven years later. Based on these undisputed facts, no reasonable criminal defense attorney could be faulted for failing to anticipate and advise a client about a future change in the law governing prison credits. Moreover, Petitioner offers no proof or convincing argument that he was prejudiced in any way, or would have refused to enter into the agreement had he known of the as-yet-unenacted change of law. The state courts objectively did not unreasonably apply federal law in denying relief on Petitioner's speculative ineffective assistance of counsel claim.[2]

IV RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an order: (1) accepting the findings and recommendations in this Report; (2) directing that judgment be entered denying the Petition; and (3) dismissing the action with prejudice.

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[2] Petitioner's broad claim that the state breached the plea agreement fails to raise a cognizable federal constitutional issue and is entirely unsupported by the factual record.

DATED: March 28, 2013

S/ Michael R. Wilner
HON. MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

Appellate Courts Case information

Supreme Court

Court data last updated: 07/08/2012 12:05 PM

Docket (Register of Actions)

HINOJOSA, (ANTONIO ARROYO) ON H.C.
Case Number S198455

Date	Description	Notes
12/05/2011	Petition for Writ of habeas corpus filed	Petitioner: Hinojosa, Antonio Arroyo Pro Per
12/06/2011	Exhibits Lodged	
04/11/2012	Petition for Writ of habeas corpus denied	

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FILED OCTOBER 18, 2005

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

In re ANOTONIO ARROYO-HINOJOSA
on Habeas Corpus

G045734

(Super. Ct. 02CF0469)

O R D E R

THE COURT:*

The petition for a writ of habeas corpus is DENIED.

s/O'Leary, J.
O'LEARY, ACTING P.J.

* Before O'Leary, Acting P J., Aronson, J., and Ikola, J.

FILED July 8, 2011

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE

In re ANOTONIO ARROYO-HINOJOSA
on Habeas Corpus

Orange County Superior Court Case Number:
M-13365 (02CF0469)

ORDER DENYING
HABEAS CORPUS

TO THE OFFICE OF THE CALIFORNIA ATTORNEY GENERAL AND PETITIONER:

HAVING REVIEWED THE ABOVE CAPTIONED PETITION FOR WRIT OF HABEAS CORPUS, THE COURT MAKES THE FOLLOWING ORDER

On July 1, 2003, petitioner pled guilty and was convicted of first degree robbery [Pen. Code, § 211/§ 212.5(a)/§ 213(a)(1)(A)]committed through the personal use of a firearm [Pen. Code § 12022.53(b)] and terrorism [Pen. Code 18186.22(a)]. Petitioner further admitted having sustained a prior strike conviction pursuant to Penal Code § 667(d)(e)(1). Petitioner was sentenced to a term of 16 years in state prison with 604 total days (525 + 79) of pre-sentence credit for time served.

Petitioner seeks habeas corpus relief claiming:

1. The California Department of Corrections and Rehabilitation's retroactive application of recently amended Penal Code § 2933.6 to restrict and/or deny petitioner's eligibility for prison conduct credit violates the terms of petitioner's plea agreement and constitutional right to due process.

2. The California Department of Corrections and Rehabilitation has unlawfully validated petitioner as a prison gang associate resulting in the retroactive application of recently amended Penal Code § 2933.6 to restrict and/or deny petitioner's eligibility for prison conduct credit in violation of petitioner's constitutional right to due process and the constitutional proscription against ex post facto legislation.

The petition is denied on the following separate and independent grounds:

The petition, as it pertains to petitioner's first claim of error, is without merit and denied on this basis. No violation of petitioner's plea agreement is established. Though petitioner is eligible to earn 15% conduct credit based on the nature of his crimes pursuant to Penal Code § 2933. 1(a), petitioner's plea agreement does not contain an express promise or guarantee that petitioner would earn 15% conduct credit against his term of imprisonment regardless of subsequent events that might occur while petitioner is serving his sentence. "A plea agreement violation claim depends upon the actual terms of the agreement, not the subjective understanding of the

defendant or deficient advice provided by his attorney." (*In re Honesto* (2005) 130 Cal. App4th 81, 92.)

To the extent petitioner maintains the trial court should have advised him of the possibility future changes in the law might adversely impact his eligibility for conduct credit, such contention is without merit. A trial court is not required to advise a criminal defendant of collateral consequences that might result from a guilty plea and conviction (*People v. Moore* (1998) 69 Cal.App.4th 626, 630.)

The petition, as it pertains to petitioner's second claim of error is denied on grounds petitioner has not sought review of his claim of error in the proper judicial venue. Petitioner claims the Department of Corrections and Rehabilitation has improperly validated petitioner as a prison gang associate which in turn has resulted in the allegedly unlawful denial of prison conduct credit while petitioner is housed in a security housing unit. Petitioner's claim is essentially a challenge to a condition of confinement. In petitioner's case, that would be the Kings County Superior Court.

"Although any superior court has jurisdiction to entertain and adjudicate a petition for writ of habeas corpus, it does not follow that it should do so in all instances." Challenges to conditions of an inmate's confinement should be entertained by the superior court of county wherein the inmate is confined. (*Griggs v. Superior Court* (1976) 16 Cal.3d 341, 347.)

The petition for writ of habeas corpus is DENIED.

DATED: May 15, 2013

s/ Craig E. Robinson
Craig E. Robinson
Judge of the Superior Court